



## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Part 115**

#### **RIN 3245-AH08**

#### **Regulatory Reform Initiative: Streamlining Surety Bond Guarantee Program**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises various regulations related to SBA's Surety Bond Guarantee (SBG) program because they are obsolete, unnecessary, ineffective, or burdensome. Additionally, this final rule clarifies and modernizes certain regulations and conforms them to industry standards.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Jermaine Perry, Management Analyst, Office of Surety Guarantees at (202) 401-8275 or [jermaine.perry@sba.gov](mailto:jermaine.perry@sba.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **A. General Information**

The U.S. Small Business Administration (SBA) guarantees bid, payment, and performance bonds for small and emerging contractors who cannot obtain surety bonds through regular commercial channels. SBA's guarantee, authorized pursuant to part B of title IV of the Small Business Investment Act of 1958, 15 U.S.C. 694a *et seq.*, gives Sureties an incentive to provide bonding for small businesses and thereby assists small businesses in obtaining greater access to contracting opportunities. SBA's guarantee is an agreement between a Surety and SBA that SBA will assume a certain percentage of the Surety's loss should a contractor default on the underlying contract. SBA is authorized to guarantee a Surety for a contract up to \$6.5 million and, with the

certification of a contracting officer of a Federal agency, up to \$10 million. For more information about SBA's Surety Bond Guarantee Program (SBG Program), see <https://www.sba.gov/funding-programs/surety-bonds>.

As part of its ongoing responsibility to ensure that the rules it issues do not have an adverse economic impact on those affected by those rules, the U.S. Small Business Administration (SBA) published an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register on June 3, 2019 (84 FR 25496) seeking input from the public in identifying regulations under the SBG Program that affected parties believed should be repealed, replaced, or modified because they are obsolete, unnecessary, ineffective, or burdensome. In the ANPRM, SBA also solicited comments from the public on how SBA can improve the surety bond products, procedures, forms, and reporting requirements of the SBG Program. SBA considered the 54 comments submitted by the public in response and published a proposed rule in the *Federal Register* on September 23, 2021 (86 FR 52844) to revise various regulations in part 115 of title 13 of the Code of Federal Regulations that are obsolete, unnecessary, ineffective, or burdensome and to clarify and modernize certain regulations to conform them to industry standards. The comment period was open until November 22, 2021.

In response to the request for comments, SBA received 8 comments, including 2 from national trade associations, 5 from surety organizations, and 1 was anonymous. The commenters expressed general support for all or some of the proposed changes, and SBA received no comments expressing opposition to any of the proposed changes (with one comment received that did not relate to any of the proposed changes).

The comments received are summarized and addressed below in the section-by-section analysis.

### C. Section-by-Section Analysis

Section 115.10. Under the current definition of “Contract” in this section, a Contract may include a maintenance agreement that is ancillary to a Contract for which SBA is guaranteeing the bond (“ancillary maintenance agreement”). SBA proposed to clarify the definition for these ancillary maintenance agreements and to also expand the definition of Contract to include stand-alone maintenance agreements.

Under the current definition, SBA will guarantee the bond for a maintenance agreement if the agreement is for 2 years or less and covers defective workmanship or materials only. It has been SBA’s long-standing interpretation that the maintenance agreement must be ancillary to the Contract for which SBA is guaranteeing the bond and may not cover defective workmanship or materials that is covered by a manufacturer’s warranty. The current definition also provides that, with SBA’s written approval, the term of a maintenance agreement can be longer than 2 years for defective workmanship or materials or cover something other than defective workmanship or materials if the agreement is ancillary to the Contract for which SBA is guaranteeing a bond, is performed by the same Principal, and is customarily required in the relevant trade or industry.

For clarity, SBA proposed to modify the existing definition by expressly applying the following requirements to all ancillary maintenance agreements: (1) the agreement must be ancillary to a Contract for which SBA is guaranteeing a bond; (2) the agreement must be performed by the same Principal; and (3) the agreement may only cover defective workmanship or materials that are not covered by a manufacturer’s warranty. With SBA’s prior written approval, the agreement covering defective workmanship or materials may be for a term longer than 2 years, or the agreement may cover something other than defective workmanship or materials, if such agreement is customarily required in the relevant trade or industry.

SBA received one comment from a national trade association expressing support for the changes to the definition, noting that the need for the SBG Program to cover stand-alone maintenance bonds was raised by a small contractor participant at a bonding awareness education program. The commenter also suggested that maintenance bonds can be structured as an annual renewable performance bond. However, annually renewable multi-year stand-alone maintenance agreements would be covered by SOP 50 45 3, section 5.5, which states that such contracts are eligible for SBA's guarantee provided that the contract amount does not exceed the statutory limit and provided that each option year following the initial contract year is treated as a separate obligation for which a new guarantee application must be submitted. SBA is adopting the changes as proposed.

Section 115.12. Under section 411(a)(1)(B) of the Small Business Investment Act of 1958, SBA may guarantee a surety bond for a total work order or contract amount that is greater than \$6,500,000 (as adjusted for inflation under 41 U.S.C. 1908), but not exceeding \$10,000,000, if a Contracting Officer (CO) of a Federal agency certifies that such a guarantee is necessary. Paragraph (e)(3) of section 115.12 currently requires the CO's certification to include a statement that the small business is experiencing difficulty obtaining a bond and that an SBA bond guarantee would be in the best interests of the Government. In response to comments received in response to the ANPRM ((84 FR 25496), SBA proposed to streamline paragraph (e)(3) to remove the requirement of this statement and require only that the CO certify that the guarantee is necessary, which as noted above is the standard set forth in the statute. SBA also proposed to update the manner in which this certification may be submitted to SBA by providing that it may be either express mailed to SBA, Office of Surety Guarantees, 409 Third Street, SW., Washington, DC 20416, or submitted by email to [suretybonds@sba.gov](mailto:suretybonds@sba.gov), along with additional information that identifies the small business and the contract. SBA received

two comments from two national trade associations expressing support for these changes, and 4 other comments expressing general support for the proposed rule. SBA is adopting the changes as proposed.

Section 115.14. Paragraph (a) of this section provides that, if one of the six events listed in paragraph (a) occurs under an SBA-guaranteed bond, the Principal and its Affiliates lose eligibility for further SBA bond guarantees. One such event, described in paragraph (a)(3), is when the Surety has established a claim reserve for an SBA-guaranteed bond of at least \$1,000, an amount which was set by the SBG Program in 1996. As SBA explained in the proposed rule, SBA considered the purpose of this provision, which is to exclude Principals that have demonstrated an unacceptable financial risk under a current SBA-guaranteed bond from receiving future SBA bond guarantees and determined that the \$1,000 claim reserve threshold no longer reflects a degree of financial risk that should trigger the Principal's ineligibility for future SBA bond guarantees. After evaluating several factors, including inflation since 1996, the increase in the maximum contract amount for which SBA can issue a bond guarantee (from \$1,250,000 in 1996 to \$6,500,000 today), and historical claim reserve data, SBA proposed to increase the amount of the claim reserve that would result in the Principal and its Affiliates losing eligibility for further SBA bond guarantees from at least \$1,000 to at least \$10,000. SBA received five comments in general support of this change, and SBA is adopting this change as proposed.

Sections 115.19 and 115.64. Under § 115.19(f)(1)(ii), SBA is relieved of liability under the bond guarantee if the bond was executed "after the work under the Contract had begun" unless the Surety submitted, and SBA executed, SBA Form 991, "Surety Bond Guarantee Agreement Addendum" with the evidence and certifications required by § 115.19(f)(1)(ii). Paragraph (f)(2)(i) currently provides that work under a contract is considered to have begun when a Principal "takes any action at the job site which would

have exposed the Surety to liability under applicable law had a bond been Executed (or approved, if the Surety is legally bound by such approval) at the time.” In addition, under 13 CFR 115.64, a Surety participating in the Preferred Surety Bond Program (PSB Surety) is prohibited from executing or approving a bond “after commencement of work under a contract” unless the Surety obtains written approval from the Director of Office of Surety Guarantees (OSG). To apply for such approval, the Surety must submit a completed SBA Form 991 with the evidence and certifications required under § 115.19(f)(1)(ii).

SBA proposed to clarify what constitutes “commencement of work” under § 115.64 by amending both §§ 115.19(f)(2)(i) and 115.64 to state that work under a contract is considered to have begun or commenced when the contractor takes any action related to the contract or bond that would have exposed its Surety to liability under applicable law had a bond been executed (or approved, if the Surety is legally bound by such approval) at the time. The work would not have to occur “at the job site” to find that work has begun or commenced under the contract. For example, SBA explained that work would be deemed to have begun or commenced when the contractor takes any financial action that would be typically covered under the bond, such as purchasing supplies that will be used to complete the contract.

SBA received five comments expressing general support for this change, and SBA is adopting the change as proposed.

Section 115.30. SBA proposed to revise the introductory language of paragraph (d)(2) to increase the maximum amount of the contracts for which a Prior Approval Surety would be permitted to use the Quick Bond Guarantee Application and Agreement (SBA Form 990A) (Quick Bond Application) from \$400,000 to \$500,000. As explained in the proposed rule, SBA conducted a risk assessment, considered factors such as the increasing average contract value, and considered the potential decrease in overall

application burden on small businesses. SBA determined that increasing the maximum contract value for using the Quick Bond Application would minimally increase program risk while reducing costs to Sureties and small businesses by \$36,343 per year. In addition to reducing costs, SBA expressed hope that this change would result in the additional benefit of increasing overall access to the SBG Program.

SBA received three comments expressly supporting this change. A commenter stated this change aligns with current surety industry practices for quick/fast bond application limits. The commenter noted that participating sureties may still want to review financial information should a contractor have questionable credit history, and SBA agrees that such review would be necessary to ensure that sureties apply standards generally accepted by the surety industry for all of its bonds, including its Quick Bond applications. The commenter stated that the proposed change makes the approval process easier and faster and provides greater opportunity for small businesses. Another commenter stated that the increase will allow businesses with simple accounting needs to pursue qualified work, and the third commenter expressed general support for the change. SBA is adopting this change as proposed.

In addition, SBA proposed to allow this streamlined form to be used in additional circumstances. Paragraph (d)(2)(ii) lists the circumstances under which the Quick Bond Application may not be used. Under paragraph (d)(2)(ii)(D), the Quick Bond Application may not be used if the contract includes a provision for liquidated damages that exceeds \$1,000 per day. In response to comments received in response to the ANPRM, SBA proposed to increase this amount to \$2,500 per day to align with current industry standards. In response to the NPRM, SBA received one comment suggesting that SBA consider using a sliding scale approach based on contract size for liquidated damages instead of increasing the maximum to \$2,500 per day,. stating that this approach would align with surety industry practices. However, SBA does not agree with creating a sliding

scale based on contract sizes and believes that SBA's approach of creating a maximum amount reduces program complexity and provides clear guidelines allowing surety partners to easily assess program requirements. In addition, SBA received 5 comments in response to the ANPRM requesting that the maximum amount of liquidated damages be set at \$2,500. SBA is adopting this change as proposed.

In addition, paragraph (d)(2)(ii)(E) provides that the Quick Bond Application may not be used for demolition contracts. As SBA explained in the NPRM, SBA proposed, in response to comments received on the ANPRM, to remove demolition contracts from the list of categories that are excluded from using the Quick Bond Application. However, as stated in the NPRM, SBA expects that Sureties will, in their underwriting, ensure that the Principal has obtained any permit that is required for demolition pursuant to Federal, State or local law and that SBA will provide further guidance on the underwriting of demolition contracts in its Standard Operating Procedures. SBA received five comments expressing general support for this change, and SBA is adopting this change as proposed.

Sections 115.32 and 115.67. Paragraph (d) of § 115.32 governs when a Prior Approval Surety must notify SBA of any increase or decrease in the contract or bond amount. It also governs when any increase or decrease in the Principal and Surety fees that results from a change in the contract amount must be remitted to SBA by the Principal or Surety or will be refunded by SBA. In addition, for the PSB Program, § 115.67(a) and (b) govern when any increase or decrease in the Principal and Surety fees resulting from a change in the contract amount must be remitted or will be refunded or adjusted. Currently, the payment for any increase in either the Principal's or the Surety's fee is due to SBA when the total amount of the change in that fee equals or exceeds \$40, and any decrease in the fee is refunded to the Principal or rebated/adjusted to the Surety by SBA when the total amount of the change in the fee equals or exceeds \$40.



SBA proposed to revise §§ 115.32(d) and 115.67 to increase the threshold amount for when an increase in the Principal or Surety fee would be due, or for when SBA would refund or rebate/adjust any decrease in these fees, from \$40 to \$250. SBA received five comments expressing general support of this change, with one commenter suggesting that this increase will save the SBA money in the long run by reducing the administrative costs involved in processing small increases in contract amounts. SBA is adopting this change as proposed.

Section 115.33. Under this section, SBA may approve a surety bonding line for a Prior Approval Surety under which the Surety may execute multiple bonds for a specified small business. SBA proposed to revise paragraph (d)(1), which addresses the form that must be submitted for a Bid Bond executed under a bonding line, to remove the reference to SBA Form 994B, “Surety Bond Guarantee Underwriting Review”, and replace it with SBA Form 990, “Surety Bond Guarantee Agreement”. SBA Form 990 is the agreement between SBA and the Surety for SBA’s guarantee of the bond and is, therefore, the appropriate form for Sureties to submit for SBA approval of a bond under a bonding line. There is no need to separately refer to SBA Form 994B in this regulation because that form, as the Surety indicates in its certification in SBA Form 990, is submitted with SBA Form 990 as a supporting document. In addition, for Final Bonds executed under a bonding line, paragraph (d)(2) of this section currently states that the Surety is to submit both SBA Forms 990 and 994B to SBA for approval. For consistency and for the same reasons described above, SBA proposed to remove the reference to SBA Form 994B in paragraph (d)(2). In response to the NPRM, SBA received five comments expressing general support for these changes and SBA is adopting the changes as proposed.

**Compliance with Executive Orders 12866, 12988, 13132, and 13563, the Congressional Review Act (5 U.S.C. 801–808), the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)**

#### Executive Order 12866

The Office of Management and Budget has determined that this rule does not constitute a “significant regulatory action” under Executive Order 12866.

#### Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. This action does not have preemptive effect or retroactive effect.

#### Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

#### Executive Order 13563

Executive Order 13563, Improving Regulation and Regulatory Review (January 18, 2011), requires agencies to adopt regulations through a process that involves public participation, and to the extent feasible, base regulations on the open exchange of information and perspectives from affected stakeholders and the public as a whole. As discussed above, SBA published an ANPRM in the Federal Register (84 FR 25496) on June 3, 2019 seeking input from the public in identifying regulations under the SBG Program that affected parties believed should be repealed, replaced, or modified because they are obsolete, unnecessary, ineffective, or burdensome. SBA also solicited comments from the public on how SBA can improve the surety bond products, procedures, forms, and reporting requirements of the SBG Program. The comment period for the ANPRM ended on August 2, 2019, and SBA considered the 54 comments submitted by the public

in response to prepare the Notice of Proposed Rulemaking published in the Federal Register on September 23, 2021 (86 FR 52844). Further, in issuing this final rule, SBA considered the 8 comments SBA received in response to the request for comments on the proposed rule.

Congressional Review Act, 5 U.S.C. 801–808

The Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804(2).

Paperwork Reduction Act, 44 U.S.C., Ch. 35

SBA has determined that this final rule would not impose new reporting or recordkeeping requirements under the Paperwork Reduction Act. However, the rule will require a minor revision to SBA Form 990A, Quick Bond Application (OMB Control No: 3245-0378), to conform to the change in 13 CFR 115.30 increasing the maximum amount of the contracts for which a Prior Approval Surety may use this streamlined application. Revising the form to change the amount from \$400,000 to \$500,000 will not have any impact on the burden for this information collection, which is currently approved under OMB Control Number 3245-0378. OMB approved SBA’s request to make this non-substantive change to the form.

Regulatory Flexibility Act, 5 U.S.C. 601-612

When an agency issues a final rule, the Regulatory Flexibility Act (RFA) requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities.” (5 U.S.C. 603(a)). However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

In the NPRM (86 FR 52844), SBA solicited comments from the public to identify which of SBA’s regulations relating to the SBG program should be repealed, replaced, or

modified because they are obsolete, unnecessary, ineffective, or burdensome. SBA also solicited comments from the public on how SBA can improve the surety bond products, procedures, forms, and reporting requirements of the SBG Program. SBA's proposed revisions in response to comments received are consistent with these goals and with increasing the consistency of these regulations with industry standards.

Under 13 CFR 115.11, Sureties participating in SBA's SBG Program must be a corporation listed by the U.S. Treasury as eligible to issue bonds in connection with Federal procurement contracts. There are 256 Treasury-listed Sureties, of which 41 are program partners in the SBG Program. SBA estimates that 12 of these 41 Surety companies are small under SBA's size standards. In addition, most small businesses that receive an SBA-guaranteed bond operate within the 236220 NAICS industry code (Commercial and Institutional Building Construction). According to the U.S. Census Bureau, there are a total of 38,079 small business companies that operate within the 236220 NAICS code, and SBA provided guarantees in 2017 for 1,602 of these small businesses. Even if the number of entities that may be affected by this rule is considered significant, SBA has determined that the economic impact on these entities would not be substantial. The rules would repeal, replace, or modify obsolete or outdated SBG Program requirements that will have the effect of reducing the burden on Sureties and small businesses that receive bonds under the SBG Program. In addition, SBA anticipates that the rules would streamline outdated procedures and increase small business access to bond guarantees. Further, the rule would reduce costs<sup>1</sup> to Sureties and small businesses receiving an SBA-guaranteed bond while any costs of adjustment to revisions are de minimis. Thus, SBA does not expect that this rule would have a significant economic impact on its program participants. Accordingly, the Administrator

---

<sup>1</sup> An example is the reduction in cost mentioned in the analysis of § 115.30.

of the SBA hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities.

### **List of Subjects in 13 CFR Part 115**

Claims, Reporting and recordkeeping requirements, Small businesses, Surety bonds.

For the reasons stated in the preamble, SBA amends 13 CFR part 115 as follows:

### **PART 115--SURETY BOND GUARANTEE**

1. The authority citation for part 115 is revised to read as follows:

**Authority:** 5 U.S.C. app 3; 15 U.S.C. 636i, 687b, 687c, 694a, and 694b note.

2. Amend § 115.10 by revising the definition of “Contract” to read as follows:

#### **§ 115.10 Definitions.**

\* \* \* \* \*

*Contract* means a written obligation of the Principal, including an Order, requiring the furnishing of services, supplies, labor, materials, machinery, equipment or construction. A Contract:

(1) Must not prohibit a Surety from performing the Contract upon default of the Principal;

(2) Does not include a permit, subdivision contract, lease, land contract, evidence of debt, financial guarantee (e.g., a contract requiring any payment by the Principal to the Oblige, except for contracts in connection with bid and performance bonds for the sale of timber and/or other forest products, such as biomass, that require the Principal to pay the Oblige), warranty of performance or efficiency, warranty of fidelity, or release of lien (other than for claims under a guaranteed bond); and

(3) May include a maintenance agreement under the following circumstances:

(i) The maintenance agreement is ancillary to a Contract for which SBA is guaranteeing a bond, is performed by the same Principal, is for a period of 2 years or less,

and only covers defective workmanship or materials that are not covered by a manufacturer's warranty. With SBA's prior written approval, the agreement may cover a period longer than 2 years, or cover something other than defective workmanship or materials, if a longer period or something other than defective workmanship or materials is customarily required in the relevant trade or industry; or

(ii) The maintenance agreement is stand-alone and is entered into in connection with a Contract for which a bond was not required and only covers defective workmanship or materials that are not covered by a manufacturer's warranty. The agreement must cover a period of 3 years or less that begins immediately after the Contract is complete and must be executed prior to the completion of the Contract. It must also be entered into with the same Principal that completed the Contract. With SBA's prior written approval, the agreement may cover a period longer than 3 years if a longer period is customarily required in the relevant trade or industry.

\* \* \* \* \*

3. Amend § 115.12 by revising paragraph (e)(3) to read as follows:

**§ 115.12 General program policies and provisions.**

\* \* \* \* \*

(e) \* \* \*

(3) *Federal Contracts or Orders in excess of \$6,500,000 (as adjusted for inflation in accordance with section 1908 of title 41, United States Code).* SBA is authorized to guarantee bonds on Federal Contracts or Orders greater than \$6,500,000 (as adjusted for inflation in accordance with 41 U.S.C. 1908), but not exceeding \$10,000,000, upon a signed certification of a Federal contracting officer that the SBA guarantee is necessary. The certification must be either express mailed to SBA, Office of Surety Guarantees, 409 Third Street, SW, Washington, DC 20416 or sent by email to [suretybonds@sba.gov](mailto:suretybonds@sba.gov), and include the following additional information:

- (i) Name, address and telephone number of the small business;
- (ii) Offer or Contract number and brief description of the contract; and
- (iii) Estimated Contract value and date of anticipated award determination.

\* \* \* \* \*

**§ 115.14 [Amended]**

4. Amend § 115.14 in paragraph (a)(3) by removing “\$1000” and adding in its place “\$10,000”.

5. Amend § 115.19 by revising paragraph (f)(2)(i) to read as follows:

**§ 115.19 Denial of liability.**

\* \* \* \* \*

(f) \* \* \*

(2)(i) For purposes of paragraph (f)(1)(ii) of this section, work under a Contract is considered to have begun when a Principal takes any action related to the contract or bond that would have exposed its Surety to liability under applicable law had a bond been Executed (or approved, if the Surety is legally bound by such approval) at the time.

\* \* \* \* \*

**§ 115.30 [Amended]**

6. Amend § 115.30:

a. In paragraph (d)(2)(i) by removing “\$400,000” and adding in its place “\$500,000”;

b. In paragraph (d)(2)(ii)(D) by removing “\$1,000” and adding in its place “\$2,500”; and

c. In paragraph (d)(2)(ii)(E) by removing “demolition,”.

**§ 115.32 [Amended]**

7. Amend § 115.32 in paragraphs (d)(2) and (3) by removing “\$40” wherever it appears and adding in its place “\$250”.

**§ 115.33 [Amended]**

8. Amend § 115.33:

a. In paragraph (d)(1) by removing the phrase “ “Surety Bond Guarantee Underwriting Review” (SBA Form 994B)” and adding in its place the phrase “ "Surety Bond Guarantee Agreement" (Form 990)”; and

b. In paragraph (d)(2) by removing the phrase “a Surety Bond Guarantee Underwriting Review (SBA Form 994B) and” in the first sentence, and removing the phrase “these forms” in the second sentence and adding in its place the phrase “this form”.

9. Amend § 115.64 by adding a new last sentence to read as follows:

**§ 115.64 Timeliness requirement.**

\* \* \* For purposes of this section, work has commenced under a Contract when a Principal takes any action related to the contract or bond that would have exposed its Surety to liability under applicable law had a bond been Executed (or approved, if the Surety is legally bound by such approval) at the time.

**§ 115.67 [Amended]**

10. Amend § 115.67 by removing “\$40” wherever it appears and adding in its place “\$250”.

Isabella Casillas Guzman,  
*Administrator.*

[FR Doc. 2022-16875 Filed: 8/5/2022 8:45 am; Publication Date: 8/8/2022]